STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2004-135

June 11, 2004

VERIZON MAINE
Petition for Consolidated Arbitration

ORDER

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we deny the Motions of the CLEC Coalition, the Competitive Carrier Coalition, and Sprint to dismiss Verizon's Petition for Arbitration and instead consolidate this proceeding with our pending Wholesale Tariff[1] proceedings. We also determine that Verizon may not condition its performance of routine network modifications on amendment of a CLEC's interconnection agreement.

II. BACKGROUND

On February 20, 2004, Verizon Maine (Verizon) filed with the Commission a Petition for Consolidated Arbitration (Petition). The Petition requested that the Commission arbitrate disputes between Verizon and competitive local exchange carriers (CLECs) and Commercial Mobile Radio Service (CMRS) carriers relating to Verizon's October 2, 2003, proposed amendment to all interconnection agreements to implement the Federal Communications Commission's (FCC) *Triennial Review Order (TRO)*. On March 2, 2004, the D.C. Circuit Court of Appeals released its decision in the *United States Telecom Ass'n v. FCC* case (*USTA II),*[2] which upheld, vacated, and remanded various portions of the *TRO.*

Since that time, the parties to this proceeding have made numerous filings, including Motions to Dismiss and multiple replies to those Motions.[3] On May 6, 2004, the Examiner issued a Report recommending that we dismiss Verizon's Petition for

[1]Docket No. 2002-682, *Verizon-Maine's Request for Commission Investigation For Resold Services (PUC #21) and Unbundled Network Elements (PUC #20)*.

[2]*U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II).*

[3]On May 4, 2004, Verizon filed a Motion for Abeyance with the Commission requesting that this proceeding be stayed pending commercial negotiations. Because our decision today results in this matter being consolidated with ongoing proceedings and requires a month of consultation between the parties, Verizon's Motion has been rendered moot.

Arbitration.[4] Exceptions were filed by Verizon, the CLEC Coalition (Mid-Maine Communications, Oxford Networks, Revolution Networks and Pine Tree Networks), the Competitive Carrier Coalition (Adelphia Business Solutions Operations, Inc. d/b/a Telcove, CTC Communications Corp, DSLnet Communications, LLC, ICG Telecom Group, Inc., Level 3 Communications, LLC and Lightship Telecom, LLC), Lincolnville Communications, Inc., Biddeford Internet Company d/b/a Great Works Internet (GWI), and Conversent.

III. ISSUES RAISED IN MOTIONS TO DISMISS

A. Procedural Infirmities

The CLEC Coalition, the Competitive Carrier Coalition, Sprint, and Conversent all request that the Commission dismiss the Petition because Verizon failed to comply with the procedural requirements of section 252 of the Telecommunications Act of 1996 (TelAct). These parties make two points. First, they argue that section 252 does not apply to Verizon's attempt to amend their interconnection agreements because the interconnection agreements contain change of law provisions which are not governed by section 252. They question the authority of the FCC to effectively override the TelAct by declaring in paragraph 703 of the *TRO* that the effective date of the *TRO* will be considered the date on which all carriers requested modification of their interconnection agreements. Second, they claim that Verizon's failure to provide notice of its intention to file for arbitration, its failure to serve all parties on the day the Commission was served, and its failure to include with its Petition a list of the unresolved issues and the positions of the parties on each issue, require dismissal. The CLECs argue that Verizon's failures have made it difficult, if not impossible, to identify and resolve all of the issues before July 2, 2004 – the deadline set by both the *TRO* and section 252.

In its Briefs, Verizon points to paragraph 704 of the *TRO* and argues that the section 252 timetable applies even in situations where the interconnection agreement contains a change of law provision. Verizon also argues that while the section 252 timetable applies, the section 252 procedural requirements do not and, thus, it did not need to follow section 252's filing requirements. Even if it were required to follow them, Verizon maintains that it has complied, at least in spirit, with the requirements. Verizon argues that the circumstances surrounding its Petition are unique and that it would be very difficult to list all the parties' positions on each issue. Finally, Verizon argues that dismissal is too drastic a measure under these circumstances.

[4] Due to time constraints, the Examiner did not summarize each party's filing but instead directed interested persons to a Summary of Motions to Dismiss found at Attachment A to the Examiner's Report as well as the filings themselves (available on our website in the virtual case file for this proceeding).

In its Exceptions, Verizon blames its failure to comply with the procedural requirements of section 252 on the CLECs, which Verizon claims never responded to the invitation to negotiate contained in its October 2nd Industry Letter. Verizon argues that the CLECs did not respond because they were trying to delay inevitable changes to their interconnection agreements.

We find that Verizon failed to comply with the procedural requirements of section 252 by failing to provide notice of its intention to file for arbitration, failing to serve all parties on the day the Commission was served, and failing to include with its Petition a list of the unresolved issues and the positions of the parties on each issue. As the Competitive Carrier Coalition pointed out in its Motion, the procedural requirements of section 252 serve an important purpose – without a detailed listing of the issues and the parties' positions, for example, it would be difficult for a state commission to resolve the issues within the statutory deadline. The responsibility for developing such a list clearly lies with the party seeking arbitration, and we will not take on that burden, nor force it on the CLECs. Thus, consistent with the additional direction we give below, as well as any procedural orders issued by the Hearing Examiner, Verizon, in conjunction with the CLECs and other parties, must develop a consolidated list of issues relevant to both the Arbitration proceeding and the Wholesale Tariff proceeding.

B. Failure to Negotiate in Good Faith

The CLEC Coalition, the Competitive Carrier Coalition, GWI, and Sprint all claim that Verizon failed to negotiate in good faith after Verizon issued its October 2nd Industry Letter. The CLEC Coalition and GWI contend that the October 2nd Industry Letter was not sufficient notice under either section 252 or the change of law provisions in their interconnection agreements. They also contend, along with the Competitive Carrier Coalition and Sprint, that Verizon's Petition should be dismissed because of Verizon's lack of good faith negotiations as required by section 252. In support of their contention, Sprint and GWI provided specific information concerning their attempts to negotiate with Verizon and the lack of response by Verizon.

Verizon contends that its October 2nd Industry Letter was sufficient to begin negotiations and that it was the CLECs' burden to initiate further discussions. Verizon states that members of the CLEC Coalition did not initiate any further discussions and argues that its lack of responsiveness to Sprint's proposal does not amount to bad faith – Verizon merely rejected Sprint's proposals.

In its Exceptions, Verizon contends that it did negotiate in good faith with Sprint and attached several affidavits to support its contention. These affidavits reiterate many of the facts alleged in the affidavit attached to Sprint's Motion to Dismiss, although Verizon reaches different conclusions as to the meaning of those facts.

Verizon also contends that it was GWI, not Verizon, who failed to negotiate in good faith.[5]

We find that the documentation Verizon attached to its Exceptions reveals that Verizon's conduct in negotiations was, at least, dilatory. Sprint sent Verizon a marked-up version of the *TRO* Amendment on October 29th – less than a month after Verizon issued its Industry Letter. It took Verizon until March 11, 2004, to provide Sprint with a substantive response – a pace that may not be consistent with the "good faith negotiations" Congress had in mind when passing the TelAct.

Section 251 of the TelAct requires all local exchange carriers to negotiate in good faith. There is a reason for this requirement: it ensures that ILECs, like Verizon, who have the upper hand in negotiations (i.e., they have the network elements that the CLECs need to access), fairly and fully participate in negotiations. It also ensures that substantive discussions and a narrowing of the issues will occur before the matter is brought to the state commission. One does not have to look any further than the face of Verizon's Petition to know that the kind of negotiations contemplated by the TelAct have not taken place.

We need reach no conclusion on whether Verizon negotiated in good faith, however, because even if we found an absence of good faith, we would not necessarily dismiss Verizon's petition. Section 252 provides state commissions with significant discretion concerning how to conduct arbitration proceedings. We find it a better use of all parties' resources for us not to dismiss the arbitration but instead to require strict adherence to good faith negotiation requirements on a going forward basis by all parties. Failure of any party to fully participate in negotiations or failure to respond in a timely way to properly issued requests for negotiation will be taken into account in our decision on the associated issue.

C. Overlap of Arbitration Issues With Existing Cases

The CLEC Coalition and the Competitive Carrier Coalition both argue that many of the issues raised in Verizon's proposed Amendment are already being considered in the Commission's Wholesale Tariff (Docket No. 2002-682) and Dark Fiber (Docket No. 2002-243) proceedings. The CLECs argue that the Commission should focus on the existing cases first, which will establish generally available terms and conditions for all of Verizon's section 251 unbundling obligations and thereby eliminate the need for arbitrating many of the issues presented by Verizon's Petition.[6] Verizon

[5]We do not reach any conclusions regarding the Verizon/GWI negotiations because GWI's allegations were not supported by an affidavit and because of the difficultly of assessing the impact of each side's allegations without obtaining additional information.

[6]Some of the same CLECs have argued in the Wholesale Tariff proceeding that the wholesale tariff should also cover Verizon's section 271 obligations.

contends that the issues raised in its Petition are distinct from the Wholesale Tariff and should be treated separately. Specifically, Verizon contends that the parties have a statutory duty to conduct their business dealings by contract and that the pending Wholesale Tariff proceeding does not obviate the need for arbitration.

A review of the issues associated with the Petition and with the Wholesale Tariff case reveals a significant overlap. The Petition (both the original and revised version) requests arbitration of Verizon's proposed *TRO* Amendment, which attempts to capture the changes in law caused by the *TRO* and *USTA II*. Specifically, Verizon seeks to amend its interconnection agreements so that they reflect *only* Verizon's unbundling obligations pursuant to section 251 and section 252 of the TelAct; Verizon's proposed amendment does *not* address any obligations it has under section 271 of the TelAct or state law. Similarly, Verizon's proposed Wholesale Tariff addresses Verizon's section 251/252 obligations and not its section 271 or state law obligations.[7]

We conditioned our support of Verizon's 271 application upon the filing of a wholesale tariff because we wanted to avoid multiple arbitration proceedings and to provide a single forum for all CLECs to litigate their disagreements with Verizon concerning the provisioning of UNEs. We have been working on that proceeding since November 2002 and were about to enter the hearing stage when the *TRO* was released, which led to changes in positions, and the need to resolve some preliminary legal issues. Once we resolve the legal issues, we should be able to move directly to the prefiled testimony, discovery, and hearing phases and resolve all outstanding issues, including those involving Verizon's section 271 obligations. A final order in the Wholesale Tariff would likely eliminate many of the issues associated with the Petition.

It might be theoretically possible to litigate the Wholesale Tariff case and the Arbitration simultaneously on separate tracks, but considerations of resources and judicial economy militate against that course. First, our resources are strained. The events of the past eight months have caused a marked increase in complaints from CLECs, which have resulted in additional Rapid Response Complaints as well as a Commission investigation into Verizon's wholesale practices – Docket No. 2004-53. The *TRO* contains numerous ambiguities, which lead to disagreements in interpretation between Verizon and the CLECs and eventually require a detailed legal analysis and decision by the Commission – all of which takes a considerable amount of our time and resources.

In addition, we are endeavoring to complete the Dark Fiber proceeding which has been fully litigated for quite some time but stalled because of the *TRO* and *USTA II* decisions. We also just recently issued a decision in the Skowhegan Online proceeding (2002-704) which took much longer than expected because of the legal disagreements and confusion caused by the *TRO* and *USTA II.* In short, the *TRO* and

[7]Verizon has argued in the Wholesale Tariff proceeding that the Commission has no authority to require Verizon to tariff its section 271 obligations.

USTA II have caused, and continue to cause, a significant drain on our resources, forcing us to make decisions concerning our docket and the use of our resources.

Finally, we acknowledge that events at the federal level and the possibility that CLECs and Verizon will reach commercially negotiated agreements may eliminate (or at least lessen) the need for state commission arbitrations. While it remains unclear whether such negotiations will be fruitful, we believe allowing additional time for negotiations may be helpful. (Verizon itself requested additional time in its Motion for Abeyance.)

Thus, we find it prudent at this time to consolidate Verizon's Petition for Arbitration with the Wholesale Tariff.[8] As stated above, the substantive issues overlap to a great extent and efficiency of process dictates that we resolve these issues only once. To ensure that the consolidated proceeding moves forward as quickly as possible, we direct the parties to develop and submit a consolidated list of issues that must be litigated in this proceeding and file that list with the Commission on **July 16, 2004**. The list should prioritize the issues, with purely legal/policy issues at the top and more fact-intensive costing issues at the bottom. The parties should also submit a joint proposed schedule for the briefing of the legal and policy issues. This schedule should be triggered by the issuance of an order on the preliminary legal issues that have already been briefed in the Wholesale Tariff proceeding.[9]

Parties that disagree with our decision today are free to pursue arbitration at the FCC pursuant to section 252(e)(5), which allows the FCC to step into the state commission's shoes and conduct the arbitration if the state refuses to act. Parties are also free to arbitrate their issues in other states and/or to participate in the commercial negotiations going on at the national level. To the extent that any party believes we have, as a technical matter, failed to perform our obligations under the TelAct because resolution of the consolidated proceeding will not occur within the 252 timetable, that party should state its position in writing no later than **June 23, 2004,** so that we do not consume further resources litigating a matter that will ultimately be taken to the FCC. Failure of any party to inform us that they intend to invoke the timetable as a basis for disputing our authority to resolve the issues raised in the Petition will be considered a waiver.

---

[8]We expect that some of the issues raised in this new consolidated proceeding may relate to dark fiber. Our Dark Fiber proceeding, Docket No. 2002-243, is already fully briefed and awaiting issuance of an Examiner's Report. We plan to move forward with reaching a decision on the issues already fully litigated in that proceeding. To the extent that parties identify any dark fiber-related issues that were not raised in the Dark Fiber proceeding, those new issues will be addressed in the consolidated proceeding.

[9]We expect the Hearing Examiner to issue an Examiner's Report on those issues by the end of June and that our deliberations would occur by the third week in July.

D. Applicability of Bell Atlantic/GTE Merger Conditions

The CLECs have argued extensively that the *TRO* does not trigger change of law provisions in their interconnection agreements because the Bell-Atlantic/GTE merger conditions require Verizon to continue to make all UNEs available until a final, unappealable decision is released. They further contend that the *TRO* and *USTA II* orders do not constitute such decisions because they were the continuation of litigation in the FCC's *UNE Remand* and *LineSharing* proceedings. Finally, they point to decisions by the FCC's Enforcement Bureau as support for their interpretation of the merger conditions.

Verizon argues that the merger conditions do not apply because: (1) they have sunset; and/or (2) *USTA I*[10] was a final unappealable decision. Thus, according to Verizon, they have no continuing obligation to provide at TELRIC prices those UNEs eliminated by the *TRO.* In its Exceptions, Verizon directs our attention to a decision by a Hearing Examiner in Rhode Island which rejected the CLECs' contentions regarding the continued enforceability of the merger conditions.

We believe the best course of action at this time is for the parties to seek guidance directly from the FCC regarding what it intended concerning the continued enforceability of the conditions. We will take any such guidance into consideration if it is issued before we make a final decision in the consolidated proceeding.

E. Routine Network Modifications

In paragraphs 630-641 of the *TRO*, the FCC discusses the obligations of ILECs to perform routine network modifications to ensure non-discriminatory access to UNEs by CLECs. These requirements were upheld by the D.C. Circuit in *USTA II*. The CLECs now argue that the *TRO* and *USTA II* confirm that ILECs have always had an obligation to perform routine modifications and that there is no need to modify their interconnection agreements to implement existing law. Verizon argues that the *TRO* decision was a change of law, that the FCC established new rules, and that CLECs must modify their interconnection agreements before Verizon will perform routine network modifications.

The *TRO* language on this subject is not clear. Whether the routine network modification rules are new law or codification of existing requirements requires examination of both the historical record and the language of the *TRO*. Historically, until the summer of 2000, Verizon performed routine network modifications, such as installing new line cards, when it was necessary to meet a CLEC's request for facilities.[11] We can conclude from Verizon's earlier behavior that it believed it had an

[10] *U.S. Telcomm. Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002)(*USTA I*).

obligation to perform those routine network modifications at that time. In 2000, Verizon established a new policy of refusing to perform routine network modifications based upon its belief that any such activities constituted new construction that ILECs were not obligated to perform.[12] This change in policy appears to reflect a decision by Verizon to attempt to shift and limit its obligations to provision certain UNEs.

During our 271 proceeding, we heard testimony and argument from CLECs regarding the discriminatory nature of Verizon's policies. At that time, we said that while we agreed that Verizon's policies prevented CLECs from making use of Verizon's facilities, we would not resolve the issue in the context of the 271 proceeding.[13] We specifically noted that the issue was before the FCC and that we would await their guidance – which they now have issued in the form of the *TRO.*

In paragraphs 632-633 of the TRO, the FCC uses language which indicates that the routine network modification requirement is new ("we adopt today") as well as language which indicates that the FCC was resolving a dispute about existing obligations ("we require" and "we conclude") regarding the line that must be drawn between requiring an ILEC to modify its network to provide CLEC access to the full functionality of the UNE and requiring an ILEC to provide superior quality access – a dispute based upon existing requirements of section 251 of the TelAct.

We find, on balance, that the *TRO* did not establish new law but instead clarified existing obligations. Section 251(c)(3) has always required that Verizon provide access to its UNEs on a non-discriminatory basis. The FCC's new rules merely clarify what is required under that existing obligation. Thus, Verizon must perform routine network modifications on behalf of CLECs in conformance with the FCC's rules. Verizon may not condition its performance of routine network modifications on amendment of a CLEC's interconnection agreement.

With regard to the pricing issues associated with the routine modifications, we do not reach a specific decision today. Instead, we find that our existing TELRIC rates should be used until we approve any additional rates in the Wholesale Tariff case or future TELRIC proceeding. Our decision is consistent with the direction given by the FCC in the *TRO.* Specifically, in paragraph 640, the FCC noted that ILEC costs for routine modifications are often already recovered in non-recurring and recurring costs associated with the UNE. In addition, the FCC noted that state commissions have the discretion to determine how any costs that are not already recovered should be recovered. Thus, to the extent that Verizon believes its existing rates do not recover the

---

[11] *Inquiry Regarding the Entry of Verizon-Maine into the InterLATA Telephone Market Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 2000-849, Order at pp 36-42.

[12] *Id*. at 42.

[13] *Id.* at 46.

costs associated with routine modifications, it may amend its cost filings in the Wholesale Tariff case and propose additional rates. If it chooses to do so, it must provide support for the new rates and, in particular, show in detail how the new costs are not already recovered in existing rates.

F. Instability of Law

Both the CLEC Coalition and the Competitive Carrier Coalition argued that that the instability of the law regarding UNEs warrants a decision by the Commission to refrain from further action on Verizon's Petition at this time. Verizon and AT&T, MCI, and Conversent argue that some provisions of the *TRO* which were not appealed should be implemented as quickly as possible. Currently, the FCC has obtained an extension of the stay of the *USTA II* decision until June 15, 2004, in order to allow parties to conduct commercial negotiations.

We agree that the state of the law is very much in flux and that additional changes may occur in the near future. However, this has been the case in the telecommunications arena since the TelAct was passed in 1996. There have been continuous litigation and ever-changing standards and requirements. If we stopped each time there was a possibility that a legal standard could be overturned, we would never reach a decision on any issue. Thus, we find that the best course of action is to proceed with litigating our new consolidated wholesale proceeding with the full knowledge that the standards used to reach our decisions may be changed in the future. Finally, while we specifically do not reach any decision today regarding whether we have, or should exercise, any authority to order the parties to maintain the status *quo* while we resolve the pending disputes, we note that any party that disturbs existing relationships does so at its peril should it ultimately be found to have acted contrary to the law.

G. Verizon's Revised Petition

AT&T contends that the revision of the *TRO* Amendment that Verizon submitted after the release of *USTA II* should be dismissed because *USTA II* is not in force yet and, even when in force, the BA/GTE merger conditions delay any change in Verizon's obligations until there is a final decision in the *TRO* appeals. Verizon contends that the revision is necessary to properly reflect existing law. Because of the

decision we reached earlier, this issue is now moot. All existing issues should be included in the consolidated list of issues due on July 16, 2004.

Dated at Augusta, Maine, this 11th day of June, 2004.

BY ORDER OF THE COMMISSION

_____

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.